

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Application by)	
Qwest Communications International, Inc.)	WC Docket No. 03-11
for Authorization to Provide)	
In-Region, InterLATA Services)	
in the States of New Mexico, Oregon,)	
and South Dakota)	

EVALUATION OF THE
UNITED STATES DEPARTMENT OF JUSTICE

R. Hewitt Pate
Acting Assistant Attorney General
Antitrust Division

Deborah P. Majoras
Deputy Assistant Attorney General

Margaret A. Ward
Counsel to the Assistant Attorney General

Leslie Overton
Counsel to the Assistant Attorney General

Communications with respect to this document should be addressed to:

Nancy M. Goodman
Chief

W. Robert Majure
Assistant Chief

Katherine E. Brown
Lauren J. Fishbein
Peter A. Gray
Joyce B. Hundley
Jodi A. Smith
Attorneys

John Henly
Economist
Economic Regulatory Section

Telecommunications and Media
Enforcement Section

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DOJ Missouri I Evaluation	Evaluation of the U.S. Department of Justice, <i>In re: Application of SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region InterLATA Services in Missouri</i> , FCC CC Docket No. 01-88 (May 9, 2001), available at < http://www.usdoj.gov/atr/public/comments/sec271/sec271.htm >.
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DOJ Qwest Multistate II Evaluation	Evaluation of the U.S. Department of Justice, <i>In re: Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in Montana, Utah, Washington, and Wyoming</i> , FCC WC Docket No. 02-189 (Aug. 21, 2002), available at < http://www.usdoj.gov/atr/public/comments/sec271/sec271.htm >.

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<i>FCC Qwest Multistate I Order</i>	Memorandum Opinion and Order, <i>In re: Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming</i> , FCC 02-314 (Dec. 23, 2002), available at 2002 WL 31863801 and < http://www.fcc.gov/Bureaus/Common_Carrier/in-region_applications >
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New Mexico PRC Final Order	Final Order Regarding Compliance with Outstanding 271 Requirements: SGAT Compliance, Track A, and Public Interest, <i>In re: Qwest Corporation's Section 271 Application and Motion for Alternative Procedure to Manage the Section 271 Process, and Qwest Corporation's Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996; Consideration of Costing and Pricing Rules for OSS, Collocation, Shared Transport, Non-Recurring Charges, Spot Frames, Combination of Network Elements and Switching; Investigation into Unfiled Agreements Between Qwest Corporation and Competitive Local Exchange Carriers</i> , New Mexico PRC Utility Case Nos. 3269, 3537, 3495 & 3750 (Oct. 8, 2002), attached to Qwest Br. App. C-MT as Tab 19.
Oregon PUC Comments	Comments of the Public Utilities Commission of Oregon, <i>In re: Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in New Mexico, Oregon, and South Dakota</i> , FCC WC Docket No. 03-11 (Feb. 3, 2003).
Oregon PUC Final Recommendation Report	Final Recommendation Report of the Commission, <i>In re: Investigation into the Entry of Qwest Corporation, formerly known as US West Communications, Inc., into In-Region Inter-LATA Services Under Section 271 of the Telecommunications Act of 1996</i> , Oregon PUC Docket No. UM 823 (Aug. 19, 2002), attached to Qwest Br. App. C-OR as Tab 14.
South Dakota PUC Comments	Comments of the Public Utilities Commission of South Dakota, <i>In re: Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in New Mexico, Oregon, and South Dakota</i> , FCC WC Docket No. 03-11 (Feb. 4, 2003).
South Dakota PUC Public Interest Order	Order Regarding the Public Interest, <i>In re: Analysis of Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996</i> , South Dakota PUC Docket No. TC01-165 (Nov. 22, 2002), attached to Qwest Br. App. C-SD as Tab 9.
South Dakota PUC ROC OSS Test Order	Order Regarding OSS Systems, ROC OSS Test, and Commercial Performance Data, <i>In re: Analysis of Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996</i> , South Dakota PUC Docket No. TC01-165 (Nov. 22, 2002), attached to Qwest Br. App. C-SD as Tab 8.

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Leap Press Release	"Leaping Over Landline: Leap Leads Wireline Displacement Trend" (June 24, 2002), <i>attached to</i> Qwest Br. App. A as Tab 1 Ex. DLT-Track A/PI-NM-7.
Qwest Badal Decl.	Declaration of John Badal, <i>attached to</i> Qwest Br. App. A as Tab 1.
Qwest Br.	Brief of Qwest Communications International Inc. in Support of Consolidated Application for Authority to Provide In-Region, InterLATA Services in New Mexico, Oregon, and South Dakota, <i>In re: Qwest Communications International Inc. Consolidated Application for Authority to Provide In-Region, InterLATA Services in New Mexico, Oregon, and South Dakota</i> , FCC WC Docket No. 03-11 (Jan. 15, 2003).
Qwest Multistate I UNE-Platform Calculations <i>Ex Parte</i>	Qwest International Inc., UNE-Platform Business and Residential Line Estimates, Qwest <i>Ex Parte</i> Submission, FCC WC Docket No. 02-148 (June 18, 2002).
Qwest Notarianni/Doherty Decl.	Declaration of Lynn M.V. Notarianni and Christie L. Doherty, <i>attached to</i> Qwest Br. App. A as Tab 8.
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WorldCom Comments	Comments of WorldCom, Inc., <i>In re: Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in New Mexico, Oregon, and South Dakota</i> , FCC WC Docket No. 03-11 (Feb. 5, 2003).
WorldCom Lichtenberg Decl.	Declaration of Sherry Lichtenberg, <i>attached to</i> WorldCom Comments as Tab 1.

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EVALUATION OF THE
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Introduction and Summary

The United States Department of Justice (“the Department”), pursuant to Section 271(d)(2)(A) of the Telecommunications Act of 1996¹ (“the 1996 Act”), submits this Evaluation of the Joint Application filed by Qwest Communications International, Inc. on January 15, 2003, to provide in-region, interLATA services in New Mexico, Oregon, and South Dakota. Qwest’s Joint Application to the Federal Communications Commission (“FCC” or “Commission”) is its first for long distance authority in each of these states. It follows close on the heels of the FCC’s approval of Qwest’s re-filed joint applications for long distance authority in Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming.²

¹ Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.).

² See *FCC Qwest Multistate I Order*. The Department was unable to support Qwest’s initial multistate applications as filed primarily due to concerns regarding the adequacy of Qwest’s manual processing of wholesale orders and provision of electronically auditable wholesale bills. DOJ Qwest Multistate I Evaluation at 2, 33; DOJ Qwest Multistate II Evaluation at 2-3, 21-22. Qwest withdrew these applications due to its inability to respond to questions regarding its compliance with Section 272 of the 1996 Act, then refiled a third multistate application. DOJ Qwest Multistate III Evaluation at 1. The Department recommended approval of this refiled multistate application subject to the Commission’s assuring itself that specified concerns had been resolved. *Id.* at 10.

As the Department has explained, in-region, interLATA entry by a regional Bell Operating Company (“BOC”) should be permitted only when the local markets in a state have been “fully and irreversibly” opened to competition.³ Qwest’s application demonstrates that it has succeeded in opening its local markets in New Mexico, Oregon, and South Dakota in many respects. The Operational Support Systems (“OSS”) in New Mexico, Oregon, and South Dakota are the same as those reviewed and approved by the Commission in its prior order,⁴ and the performance data submitted in support of this application appear generally consistent with those submitted in support of that prior application.⁵ The Department therefore recommends that the Commission approve Qwest’s application for long distance authority in these states, if it is able to assure itself that the concerns expressed in this Evaluation have been resolved.

I. State Commission Section 271 Proceedings

The New Mexico Public Regulation Commission (“New Mexico PRC”), the Oregon Public Utility Commission (“Oregon PUC”), and the South Dakota Public Utilities Commission (“South Dakota PUC”), working independently and together, have facilitated the development of competition in their respective local telecommunications markets.

A. Regional Oversight Committee Proceedings/OSS Test

In 1999, the Regional Oversight Committee (“ROC”), a cooperative group of state regulatory commissions in the Qwest local service region, including all three of the applicant

³ See DOJ Oklahoma I Evaluation at vi-vii, 36-51.

⁴ See *FCC Qwest Multistate I Order* ¶ 34 (“Qwest provides non-discriminatory access to its OSS”), ¶¶ 35-37 (discussing relevance of Qwest’s regionwide OSS). See generally Qwest Notarianni/Doherty Decl. (addressing Qwest OSS).

⁵ See Qwest Br. at 110 (“This Application makes the same showing with respect to New Mexico, Oregon and South Dakota that Qwest made in its earlier Section 271 proceeding.”). See generally Qwest Williams Decl. (addressing commercial performance results for applicant states); *FCC Qwest Multistate I Order* Apps. B-J (listing performance results). But see *infra* note 32.

states,⁶ initiated a collaborative process focusing on the attainment of Section 271 authority by examining the legal framework for opening local markets, and by designing and executing a third-party OSS test.⁷ As explained in the Department's Qwest Multistate I Evaluation, repeated iterations of documentation, systems, and processes, and substantial retesting throughout the testing conducted by KPMG, improved Qwest's OSS "to the point where only a few questions regarding their adequacy to support competitive local entry" remained when Qwest filed its first Section 271 applications.⁸

B. Multistate Collaborative Process

The New Mexico PRC worked with six other states in the Multistate Collaborative Process ("MCP"), which involved fact-finding on aspects of the competitive checklist, Section 272, Track A requirements, and the public interest analysis, including post-entry performance assurance.⁹ The MCP included numerous collaborative workshops during which CLECs, Qwest, and state commission staffs addressed and recommended resolution of disputed issues, with each state retaining authority to accept or reject such recommendations.¹⁰

⁶ See Qwest Br. at 111 (noting ten other state commissions in the Qwest region participated in the process).

⁷ Qwest Notarianni/Doherty Decl. ¶ 19 & Ex. 4 (letter from ROC to then USWest, proposing regionwide, collaborative OSS test (June 23, 1999)). See generally *id.* (extensive description of test development, implementation, and results).

⁸ DOJ Qwest Multistate I Evaluation at 7-8; see also *FCC Qwest Multistate I Order* ¶¶ 9-13 (describing the development of the ROC process).

⁹ New Mexico PRC Comments at 6. The New Mexico PRC joined the six state commissions involved in the MCP (Idaho, Iowa, Montana, North Dakota, Utah, and Wyoming) after the workshops had begun, but New Mexico CLECs were given the opportunity to raise issues related to the first workshop. Qwest Badal Decl. ¶¶ 8, 29; see also *FCC Qwest Multistate I Order* ¶ 14 (describing the MCP process).

¹⁰ See Qwest Br. at 5-7.

C. Individual State Commission Proceedings

The New Mexico PRC independently reviewed the Multistate record¹¹; conducted state-specific pricing proceedings to establish initial rates for unbundled network elements (“UNEs”) and interconnection, and recently modified and approved Qwest’s proposed adjustment of core UNE rates using the new Colorado rates as benchmarks¹²; and participated in the MCP’s review of the “QPAP” post-entry performance assurance plan, which it reviewed, modified, and subsequently adopted.¹³ The New Mexico PRC recommended that the FCC approve Qwest’s application subject to the FCC’s determination as to Qwest’s satisfaction of Track A.¹⁴

The Oregon PUC adjudicated workshops and issued reports addressing and resolving checklist criteria and issues related to Qwest’s compliance¹⁵; used the results of the testing in the ROC¹⁶; adopted the QPAP¹⁷; and held UNE pricing proceedings to establish initial rates and subsequently accepted adjusted rates based on the new Colorado rates as benchmarks.¹⁸ The Oregon PUC recommended that the FCC approve Qwest’s application to provide in-region, interLATA service.¹⁹

¹¹ New Mexico PRC Comments at 1-2, 31.

¹² *Id.* at 2, 7-8, 37-44 (detailing the New Mexico PRC’s review and approval of Qwest’s proposed, Colorado-benchmarked rates); New Mexico PRC Final Order ¶¶ 38-64.

¹³ New Mexico PRC Final Order ¶¶ 65-78 (accepting and adopting the QPAP attached as Ex. K to the 10th Revised SGAT subject to the understanding that the New Mexico PRC has final authority to enforce and modify the QPAP through change management and review processes).

¹⁴ New Mexico PRC Comments at 2-4, 29-30, 60-63; New Mexico PRC Final Order ¶¶ 154-56, 306; *id.* at 148-49.

¹⁵ Oregon PUC Comments at 3; Oregon PUC Final Recommendation Report at 3-6.

¹⁶ Oregon PUC Comments at 8-9, 12-13; Oregon PUC Final Recommendation Report at 7-8.

¹⁷ *See* Oregon PUC Comments at 13-14, 18; *see also* Oregon PUC Final Recommendation Report at 14-18.

¹⁸ Qwest Thompson OR Decl. ¶¶ 7-28.

¹⁹ Oregon PUC Comments at 19; Oregon PUC Final Recommendation Report at 20.

The South Dakota PUC implemented procedures allowing for resolution of disputed issues²⁰ and participated in the ROC collaborative development of performance measurements and standards.²¹ The South Dakota PUC participated in the development of the QPAP but declined to accept some features of Qwest's proposed South Dakota QPAP, including an annual cap on Qwest's financial liability and limitations on the ability of the South Dakota PUC to require that Qwest make future changes to the QPAP.²² The South Dakota PUC also conducted proceedings to establish initial UNE rates; more recently, it permitted Qwest's proposed adjusted rates based on the new Colorado rates as benchmarks to go into effect.²³ The South Dakota PUC found that Qwest has met the 14-point checklist and the Track A requirements but was unable to recommend that approval of Qwest's Section 271 application be found in the public interest, unless and until Qwest made specified revisions to its QPAP.²⁴

²⁰ South Dakota PUC Comments at 1-8.

²¹ *Id.* at 2-4; South Dakota PUC ROC OSS Test Order at 1, 5-6.

²² South Dakota PUC Comments at 4, 9-11 (explaining South Dakota PUC's concerns that Qwest's proposed cap on liability could reduce the QPAP's effectiveness in South Dakota), 11-14 (explaining South Dakota PUC's concerns regarding limitations on its ability to modify the QPAP); *see also* Qwest Br. at 172. These concerns led the South Dakota PUC to refrain from finding that Qwest's entry into long distance would be in the public interest. South Dakota PUC Comments at 16; South Dakota PUC Public Interest Order at 38-39. The South Dakota PUC proposed alternative language regarding a cap: liability would be limited to 36 percent of the prior year's ARMIS net return, or \$15 million, whichever is greater. South Dakota PUC Comments at 11. The South Dakota PAP appears substantially similar to the PAPs in place elsewhere in the Qwest region. *See id.* at 13 ("The Commission recognizes that Qwest's [language regarding the PUC's ability to make changes to the PAP at the six-month review] is similar to language the FCC found to be adequate in the Wyoming QPAP. However, that does not mean that this language is right for South Dakota."); *see also FCC Qwest Multistate I Order* ¶ 463. The South Dakota PUC directed Qwest to file revisions to its South Dakota PAP consistent with its order by February 17, 2003. South Dakota PUC Comments at 16.

²³ Qwest Thompson SD Decl. ¶¶ 7-14 (describing South Dakota PUC's establishment of rates), ¶¶ 15-26 (explaining Qwest's reduction of certain rates).

²⁴ South Dakota PUC Comments at 16.

II. Entry into the Local Telecommunications Markets

In assessing whether the local markets in a state are fully and irreversibly open to competition, the Department looks first to the actual entry in a market.²⁵ But the Department does not broadly presume that all three entry tracks – facilities-based, UNEs, and resale – are open or closed on the basis of an aggregate level of entry alone.²⁶ The following table reports CLEC entry in New Mexico, Oregon, and South Dakota in terms of shares of total residential and business lines served and shares of residential and business lines served by each mode of entry.

²⁵ See DOJ Pennsylvania Evaluation at 3-4 (“The Department first looks to actual competitive entry, because the experience of competitors seeking to enter a market can provide highly probative evidence about the presence or absence of artificial barriers to entry. Of course, entry barriers can differ by types of customers or geographic areas within a state, so the Department looks for evidence relevant to each market in a state.” (Footnote omitted.)).

²⁶ See, e.g., DOJ Georgia/Louisiana I Evaluation at 7 (“Although the Department presumes that fully facilities-based competition is not hindered in a competitively significant manner based on the entry recorded in Georgia, the amount of entry does not justify extending such a presumption to other modes of entry in Georgia.”); DOJ Missouri I Evaluation at 6-7 (“The Department presumes that opportunities to serve business customers by fully facilities-based carriers and resellers are available in Missouri, based on the entry efforts reflected in SBC’s application. There is significantly less competition to serve residential customers. There also is less competition by firms seeking to use UNEs, including the UNE-platform, and there are some indications that a failure by SBC to satisfy all of its obligations may have constrained this type of competition.” (Footnotes omitted.)).

CLEC Entry by State²⁷

		New Mexico	Oregon	South Dakota
Total Lines ²⁸		846,101	1,576,897	282,384
Total Bus. Lines		251,598	588,597	104,618
Total Res. Lines		594,503	988,300	177,766
CLEC Shares	% Total Lines	2.9	21.3	29.4
	% Total Bus.	9.4	46.2	38.0
	% Total Res.	0.2	6.4	24.4
	% Bus. Fac-B	6.8	44.4	22.4
	% Bus. UNE-P ²⁹	2.1	0.6	12.2
	% Bus. Resale	0.5	1.4	3.4
	% Res. Fac-B	0.0 ³⁰	1.1	16.2
	% Res. UNE-P ³¹	0.01	4.7	2.0
% Res. Resale		0.2	0.6	6.2

²⁷ See Qwest Teitzel Decl. at 33 tbl. (line counts as of November 2002) & Exs. DLT-Track A/PI-NM-1 at 1, 3, -PI-OR-1 at 1, 4, -PI-SD-1 at 1, 3. The second three categories report CLEC lines as percentages of total lines, business lines, and residential lines, respectively; the last six categories report percentages of business and residential lines served by CLECs by means of each mode of entry, i.e., facilities-based (service via primarily a CLEC's own fiber optic network that is either connected directly to the customer premises or connected through loops leased from the BOC), UNE-platform (a combination of loop, switch, and transport elements), and resale.

Qwest offers two sets of calculations of line estimates, *see id.* ¶¶ 52-58, and, as explained previously, the Department generally relies on the E-911 database entries, *see, e.g.,* DOJ Georgia/Louisiana I Evaluation at 8 n.24; *see also* DOJ Qwest Multistate I Evaluation at 12 n.48. However, E-911 database entries understate the number of CLEC facilities-based lines in the states examined here because many of the local exchanges served by such carriers do not yet have E-911 capability. Qwest Teitzel Decl. ¶ 53. Further, E-911 records do not reflect lines served by independent LECs within Qwest service territory. *Id.* ¶ 54 n.81.

²⁸ Figures report total lines in Qwest's service area in these states, each of which has several incumbent local exchange carriers other than Qwest. *See, e.g., id.* ¶ 53 & n.79.

²⁹ Qwest Multistate I UNE-Platform Calculations *Ex Parte* at 1-2 (explaining estimate of business and residential line counts).

³⁰ In its application, Qwest did not rely on E-911 data for its estimate of facilities-based residential lines served by CLECs in New Mexico, but relied on the results of a survey conducted by Qwest of subscribers to the "Cricket" PCS service offered by Leap Wireless in Albuquerque and Santa Fe. Qwest Teitzel Decl. ¶ 33 & n.83. The Department defers to the Commission to decide whether PCS service can satisfy the Track A facilities-based residential competition requirement. *See infra* text Part III. When surveyed, 360 Leap subscribers, or 0.06 percent of total residential customers in Qwest's service area, responded that they had no wireline service in their homes. Qwest Teitzel Decl. Ex. DLT-Track A/PI-NM-5 at 24-25; *see supra* note 27 & accompanying text. Qwest estimates from these results that 8,410 (18.5 percent of Leap's estimated 45,370 New Mexico customers), or 1.4 percent of total residential customers in Qwest's service area, have substituted Leap's wireless service for Qwest's wireline service. *Id.*

³¹ Qwest Multistate I UNE-Platform Calculations *Ex Parte* at 1-2.

Given the regional nature of Qwest's OSS, the Department evaluates entry regionwide, taking note that pricing or other state-specific factors may significantly affect the degree to which CLECs use a mode of entry in a particular state. In the states addressed in this application, the levels of entry, the evidence from entry in other states within the region, and the absence of evidence that entry has been unduly hindered by problems with obtaining inputs from Qwest, lead the Department to conclude that opportunities are available to competing carriers serving business customers. The level of entry by facilities-based CLECs to serve business customers in Oregon and South Dakota is particularly notable.

Regarding competition for residential customers, the Department finds that the facilities-based mode of entry is open in South Dakota. Although in New Mexico and Oregon there is less entry to serve residential customers via facilities (including UNE-loops), the Department does not believe there are any material obstacles to such entry in those states created by Qwest.³² The

³² WorldCom has made several allegations based on its recent experience entering Qwest's region via its own systems. WorldCom Lichtenberg Decl. ¶¶ 2-3 (explaining WorldCom had initially entered Qwest's markets by placing orders over Z-Tel's systems but in January 2003 began placing orders through its own systems). WorldCom claims that Qwest's representations regarding the functioning of its OSS are not consistent with WorldCom's experience. *Id.* ¶¶ 26-28 (alleging Qwest's process for CLECs to submit supplemental orders before the customer service record ("CSR") has been updated in Qwest's back-end systems caused WorldCom's supplemental orders to be rejected, despite Qwest's claims to the contrary); *see also FCC Qwest Multistate I Order* ¶ 59 (noting Qwest's assurances that "a supplemental order can be submitted without the CSR being first updated"). WorldCom also asserts that Qwest's implementation of industry standard migrate-as-specified, planned for April 2003 will not apply as originally understood for features such as call-forwarding. WorldCom Lichtenberg Decl. ¶¶ 4, 19; *see also FCC Qwest Multistate I Order* ¶ 58 (Commission "heartened" by Qwest's plan to implement migrate-as-specified on April 7, 2003, so that CLECs will no longer have to differentiate between features that are being retained and those that will be added). In addition, WorldCom claims that there are errors in Qwest documentation, upon which it relied in designing its systems. WorldCom Lichtenberg Decl. ¶¶ 6-12 (claiming Qwest's incorrect information regarding the location of telephone numbers on the CSR caused WorldCom's orders to be rejected and WorldCom to shut down its systems for two weeks in order to redesign the CSR search), ¶¶ 13-18 (claiming Qwest did not make clear that its systems required a 10-digit telephone number, including area code, for the end-users' old call-forwarding number, even where the end-users' CSR lists only 7 digits). However, WorldCom neither presents detailed underlying data nor explains why its experience using its own systems appears to have been more negative than that using Z-Tel's systems. *Compare id.* ¶ 5 ("almost all" initial orders submitted over WorldCom's own systems rejected) *with* DOJ Qwest Multistate I Evaluation at 14-16 & n.59 (discussing Pre-Order/Order Integration of Qwest's systems and citing WorldCom claim that 30 percent of its orders submitted over Z-Tel's systems were rejected due to inadequate integration). WorldCom's allegations do not directly contradict the evidence on which the Commission relied in approving Qwest's prior application, but they do implicate some of the additional assurances that Qwest had made in support of that application. Qwest should clarify its position, and the Commission should carefully review that response.

Department also concludes, due largely to the absence of CLEC complaints, that Qwest has fulfilled its obligations to open the resale mode of entry to competition in all three states.

III. Track A in New Mexico

Questions have been raised regarding Qwest's compliance with the requirements of Track A³³ in New Mexico as there appears to be little, if any, competition for residential subscribers using CLECs' own wireline facilities or unbundled elements obtained from Qwest.³⁴ Instead, Qwest has introduced evidence regarding residential competition from resellers in New Mexico and from Leap Wireless, a PCS provider.³⁵ Qwest primarily relies on the use of Leap's PCS service as a substitute for wireline service to satisfy Track A requirements, and asserts that at least 18.5 percent of Leap's subscribers in New Mexico have substituted the PCS service for Qwest's local wireline service.³⁶

With respect to the relevance of resale competitors to its satisfaction of Track A requirements, Qwest presented to the New Mexico PRC evidence regarding the overall level of

³³ 47 U.S.C. § 271(c)(1)(A) (A BOC is required to have "entered into one or more binding agreements . . . [for] access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service . . . to residential and business subscribers. . . . [S]uch telephone exchange service may be offered by such competing providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier.").

³⁴ AT&T Comments at 6-22; WorldCom Comments at 7-13.

³⁵ Qwest Teitzel Decl. ¶ 10.

³⁶ *Id.* ¶ 43. Leap is a broadband PCS provider which offers local service, without roaming or long distance, to residential subscribers in 40 cities across the United States including Albuquerque and Santa Fe. Leap Press Release at 1, 2. Leap has claimed that more than a quarter of its subscribers across the nation use its PCS service as a substitute for wireline service. *Id.* at 1. Qwest performed a two-part telephone survey of Leap subscribers in New Mexico and 360, or 18.5 percent, of those interviewed said that they had no wireline phone. Qwest Teitzel Decl. Ex. DLT-Track A/PI-NM-5 at 24-25. The New Mexico PRC found "significant problems" in Qwest's survey methodology yet added that it is "difficult to believe that [Leap] is serving in excess of 40,000 New Mexicans without a significant number of those customers engaging in some form of wireline substitution." New Mexico PRC Final Order ¶¶ 154-55.

residential resale service in New Mexico rather than evidence of a predominantly facilities-based carrier serving residential subscribers via resale.³⁷

The FCC has not previously relied on resale or PCS competition to satisfy the Track A residential competition requirement.³⁸ Thus, the New Mexico PRC referred “these significant issues of first impression” to the FCC for resolution.³⁹ The Department, too, “defer[s] to the Commission’s expert judgment in interpreting its own statute.”⁴⁰ The Commission’s conclusion on this specialized issue of statutory construction as applied to the record in any particular state, however, may not be predictive of how the Department would analyze or define any particular telecommunications market or determine market participants in an antitrust matter. Although the FCC’s analysis of the Track A issues may be informed by traditional principles of market analysis,⁴¹ the interpretation of Track A requirements properly has been focused on maintaining the Act’s incentives for the development of local competition.⁴² Thus, the Commission’s

³⁷ Compare *id.* ¶ 131 with *FCC Kansas/Oklahoma Order* ¶ 43 n.101 (quoting *FCC Louisiana II Order* ¶ 48). The record submitted to the FCC suggests that at least one carrier is offering facilities-based (UNE-platform) service to business subscribers and resale service to both business and residential subscribers, although more lines are offered via resale than via facilities. Qwest Teitzel Decl. Ex. DLT-Track A/PI-NM-1.

³⁸ See *FCC Louisiana II Order* ¶¶ 31-42; *FCC Kansas/Oklahoma Order* ¶ 43 n.101.

³⁹ New Mexico PRC Final Order ¶ 156.

⁴⁰ DOJ Louisiana I Evaluation at 5.

⁴¹ See *FCC Louisiana II Order* ¶¶ 31-34.

⁴² See *FCC Oklahoma I Order* ¶ 46 (“Thus, by expecting Track A to be the primary means of BOC entry, Congress created an incentive for BOCs to cooperate with potential competitors in the provision of access and interconnection and thereby facilitate competition in local exchange markets.”). The Commission appears to have recognized the difficult situation that would be presented if the requirements of the statute are otherwise met but a BOC that had opened its local market in a state were put into an indefinite limbo that only its competitors could relieve. *FCC Kansas/Oklahoma Order* ¶ 43 n.101 (quoting *FCC Louisiana II Order* ¶ 48). The Commission has been careful to avoid this “no-man’s land” in interpreting the interaction of the requirements of Track A and Track B. See *FCC Oklahoma I Order* ¶ 54. The fact that entrants are not entering a market that is determined to be fully and irreversibly open to competition would seem to be a relevant fact in the question of whether any of the interconnection requests that initially precluded the possibility of a Track B application should still be deemed to qualify as potential Track A requests. *Id.* ¶ 58 (recognizing that “there may be a basis for revisiting our decision that Track B is foreclosed in a particular state. For example, if following such a determination a BOC refiles its Section 271 application, we may reevaluate whether it is entitled to proceed under Track B in the event relevant facts demonstrate that none of its potential competitors is taking reasonable steps toward implementing its request in a fashion that will satisfy Section 271(c)(1)(A)”). The record in this matter does not demonstrate whether such a situation is present in New Mexico. Qwest applied for Section 271 authority pursuant to Track A, *see, e.g.*, Qwest

conclusion for purposes of Track A that a BOC has proved that “more than a *de minimis*” number of customers are served by CLECs⁴³ would not necessarily be adequate to prove in the context of an antitrust inquiry that alternatives exist for a sufficient number of consumers to constrain a hypothetical price increase. Furthermore, the question of whether a firm is an “actual commercial alternative” for purposes of Section 271 review, viewed in this case from the perspective of whether residential customers have chosen a specialized offering of PCS service as an alternative to Qwest’s wireline service in New Mexico, is not necessarily coincident with the question of whether customers would switch their service in response to a “small but significant and nontransitory” price increase such that it would not be profitable for a “hypothetical monopolist” to impose such a price increase, the inquiry relevant to establishing a market in a merger investigation.⁴⁴

IV. Conclusion

Qwest’s application demonstrates that it has succeeded in opening its local markets to competition in many respects. Based on this record, and subject to the Commission’s assuring

Teitzel Decl. ¶ 4, and, while withholding judgment as to whether Qwest satisfied the Track A requirements, the New Mexico PRC reviewed the application solely on that basis, New Mexico PRC Final Order ¶¶ 84-157. *See also FCC South Carolina Order* ¶¶ 64-67 (reflecting further on the “reasonable steps” dicta of *FCC Oklahoma I Order* and pointing out the statute expressly empowers state commissions to nullify the foreclosure of Track B; FCC would give such a certification conclusive effect so long as it was consistent with the statute). The protections of Track B should not be read out of the statute but should remain available to avoid conditioning a BOC’s entry in a particular state solely on the actions of entrants who have demonstrated no interest in serving business and residential customers in a local market which has been proven open for both.

⁴³ *FCC Kansas/Oklahoma Order* ¶ 42.

⁴⁴ *Horizontal Merger Guidelines* at 5-13.

itself that the concerns expressed in this Evaluation have been resolved, the Department recommends that the FCC approve Qwest's application.

Respectfully submitted,

/s/ Nancy M. Goodman
Nancy M. Goodman
Chief

R. Hewitt Pate
Acting Assistant Attorney General
Antitrust Division

Deborah P. Majoras
Deputy Assistant Attorney General
Antitrust Division

Margaret A. Ward
Counsel to the Assistant Attorney General
Antitrust Division

Leslie Overton
Counsel to the Assistant Attorney General
Antitrust Division

W. Robert Majure
Assistant Chief

John Henly
Economists
Economic Regulatory Section

Katherine E. Brown
Lauren J. Fishbein
Peter A. Gray
Joyce B. Hundley
Jodi A. Smith
Attorneys

Telecommunications and Media
Enforcement Section

Antitrust Division
U.S. Department of Justice
1401 H Street, NW, Suite 8000
Washington, DC 20530
(202) 514-5621

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Certificate of Service

I hereby certify that I have caused a true and accurate copy of the foregoing Evaluation of the United States Department of Justice to be served on the persons indicated on the attached service list by first class mail, overnight mail, hand delivery, or electronic mail on February 20, 2003.

/s/ Joyce M. Hundley
Joyce M. Hundley
Attorney
Telecommunications and Media
Enforcement Section
Antitrust Division
U.S. Department of Justice

Service List

Chairman Michael K. Powell
Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Commissioner Jonathan S. Adelstein
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Janice Myles
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Room 5-C327
Washington, D.C. 20554

Kimberly Cook
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Gary Remondino
Wireline Competition Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Room 5-C140
Washington, D.C. 20554

Qualex International
Portals II
445 12th Street, SW
Room CY-B402
Washington, D.C. 20554

Anthony Medeiros
New Mexico Public Regulation Commission
Marian Hall
224 East Palace Avenue
Santa Fe, NM 87501

David Booth
Program Manager, Competitive Issues
Public Utility Commission of Oregon
550 Capitol St. NE #215
P.O. Box 2148
Salem, OR 97308-2148

Pam Bonrud
Executive Director
South Dakota Public Utilities Commission
500 E. Capitol
Pierre, SD 57501

Chairwoman Lynda M. Lovejoy
Vice-Chairman David W. King
Commissioner Herb H. Hughes
Commissioner Jerome D. Block
Commissioner E. Shirley Baca
New Mexico Public Regulation Commission
1120 Paseo de Peralta
P.O. Box 1269
Santa Fe, NM 87504-1269

Chairman Roy Hemmingway
Commissioner Lee Beyer
Commissioner Joan H. Smith
Public Utility Commission of Oregon
550 Capitol St. NE #215
P.O. Box 2148
Salem, OR 97308-2148

Chairman Robert K. Sahr
Commissioner Gary Hanson
Commissioner James A. Burg
South Dakota Public Utilities Commission
500 East Capitol
Pierre, SD 57501

R. Steven Davis
Dan L. Poole
Andrew D. Crain
John L. Munn
Lynn A. Stang
Qwest Communications International Inc.
1801 California Street
Suite 4700
Denver, CO 80202

Peter A. Rohrbach
Mace J. Rosenstein
Linda L. Oliver
David L. Sieradzki
Hogan & Hartson L.L.P.
Columbia Square
555 Thirteenth Street NW
Washington, D.C. 20004
Counsel for Qwest Communications
International Inc.